BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHAD L. ELLIOTT	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,024,772
	)	
TYSON FRESH MEATS, INC.	)	
Self-Insured Respondent	)	

ORDER

Respondent requested review of the October 18, 2006, Award entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument on January 24, 2007.

APPEARANCES

Jan L. Fisher, of Topeka, Kansas, appeared for claimant. Gregory D. Worth, of Roeland Park, Kansas, appeared for self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found that claimant had a functional impairment of 5 percent to the body as a whole. The ALJ also found that claimant was terminated for a reason that may have represented a failure in job performance but did not represent intentional, palpable harm to the employer. The ALJ concluded that claimant exercised good faith in finding employment after his termination by respondent and found that he had a 44 percent wage loss to April 29, 2005, and a 47 percent wage loss thereafter. The ALJ gave equal deference to the assessments of Dr. Glenn Amundson and Dr. Chris Fevurly and found that claimant had a task loss of 38 percent. By averaging claimant's percentages of wage loss and task loss, the ALJ concluded that claimant was entitled to a 41 percent work disability to April 29, 2005, and a 42.5 percent work disability thereafter.

Respondent argues that claimant acted in bad faith by violating respondent's attendance policy, which led to his termination by respondent. Respondent asserts that because of claimant's bad faith, he should be limited to an award for his functional impairment of 5 percent. In the event the Board finds that claimant is entitled to a work disability, respondent argues that claimant should be limited to a 33.5 percent permanent partial impairment based on a wage loss of 36 percent and a task loss of 31 percent.

Claimant asserts that the ALJ's finding that he is entitled to a work disability should be affirmed. Claimant argues, however, that the ALJ should have used Dr. Amundson's task loss opinion of 40 percent rather than averaging the task loss percentages of Drs. Amundson and Fevurly. Claimant also argues that he has a 48 percent wage loss. Averaging a task loss of 40 percent and a wage loss of 48 percent would represent a work disability of 44 percent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Respondent has an attendance policy whereby employees collect points. When an employee reaches 14 points, that employee is terminated. An employee would collect three points for being absent for a full shift without proper notification. Two points would be awarded for being two or more hours late without proper notification. An employee would receive one point for missing a shift with proper notification, being more than two hours late with proper notification, or being less than two hours late without proper notification. One/half point would be earned for being less than two hours late with proper notification or leaving work early with management approval. No points would be awarded for previously excused absences or tardiness; for previously authorized leave; when sent home by management due to illness, emergency, or crewing; for an absence authorized by a physician for a work-related illness or injury; for declination of light duty; for compensated days; or for disciplinary suspensions. An employee must notify his or her supervisor at least 30 minutes prior to the employee's starting time of any absences or tardies.[1]

Claimant started working for respondent as a general maintenance mechanic on October 19, 1999, at its plant in Madison, Nebraska. He voluntarily transferred to the plant in Emporia and began working there on November 3, 2003. He previously had a low back injury while working for respondent in March 2001. That injury required only in-plant care. He did not see a doctor and did not miss any work. By the time claimant transferred to the Emporia plant, he was having very little pain in his low back.

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[1] Linebarger Depo., Ex. 1 at 1-2.

Claimant testified that although he retained his same position with respondent when he transferred to Emporia, the equipment in Emporia was bigger and heavier. He also said there was a lack of teamwork in Emporia, so he did not have help. He was required to keep a 33-pound tool belt strapped to his shoulder, and as part of his duties, he was required to lift machinery weighing from 50 to 70 pounds. He would bend, twist, and stoop. In Nebraska, the plants used ramps, but in Emporia he was required to haul carts up stairs. At some point, claimant's low back pain changed from an occasional twinge to a more severe problem. He attributed this change to the increased level of physical activity at the Emporia plant.

Claimant testified by December 15, 2004, he was experiencing severe, sharp pain in his lower back. He had occasional pain in his groin area. He reported his injuries to the nurse at the dispensary and was sent to see Dr. Fevurly, who treated him with medication, exercises, and physical therapy. Dr. Fevurly released him from treatment on April 7, 2005, with permanent restrictions of occasional lifting of no more than 40 pounds, avoiding repetitive bending and twisting, and alternating sitting and standing.

After being given permanent restrictions, claimant was moved around in the maintenance department. He was given training on the computer, worked in the shop, and cleaned in the engine room. Although the computer training was within his restrictions, the cleaning required him to do a lot of bending, stooping and twisting. He complained to his supervisor about the amount of bending he was doing. He was then assigned to rebuild shackles. There was a lot of bending involved in that job. He informed his supervisor that he was having difficulty with that job but was told that the weight limit in the job was only 31 pounds. Claimant argues that respondent disregarded his restriction against repetitive bending and twisting.

On April 22 and 23, 2005, claimant's pain was severe. He was scheduled to work on Sunday, April 24, from 2 p.m. to 10:30 p.m. However, as soon as he got up, he knew he was unable to work because of his severe pain. Claimant testified he had no phone to call in and none of his neighbors were home. Nor did he have a vehicle available to drive himself to the plant. He said that in order to sign a declination, he would have had to physically go in to talk to a nurse at the dispensary but that there is no nurse on duty on Sunday. Claimant said that a coworker, Derek Blocklinger, showed up to pick him up for work. He could have ridden to the plant with Mr. Blocklinger to let his supervisor know he was not going to be working, but he was afraid he would not be able to find someone to take him back home, plus a nurse would not be available for him to sign a declination. Claimant told Mr. Blocklinger he was not going to work that day and asked him to tell his supervisor. Claimant knew that would not satisfy his requirement to call. Claimant waited until a neighbor returned home, at which time he called his supervisor to explain why he was not at work. By this time, it was past his 2 p.m. starting time. Claimant testified he told his supervisor that the reason he was not at work was because he was in pain and that the pain was related to his back injury.

Claimant thought he had 11 points previous to April 24, 2005. He also thought that calling in later than 30 minutes before his shift would earn him 1 and 1/2 points. He admitted that if he called in more than two hours after his shift began, he would earn three points. He testified that to the best of his knowledge, he called in within two hours of the beginning of his shift on April 24. However, claimant was terminated by respondent for having accumulated 14 attendance points.

After he was terminated by respondent, claimant received treatment for a work-related shoulder problem. He had surgery on his shoulder on August 31, 2005, performed by Dr. John Wertzberger and was released with no restrictions pertaining to his shoulder on February 7, 2006. During this period of time, claimant began looking for work he could do within the restrictions Dr. Fevurly had placed on him. Because the only jobs available to him were in fast foods or entry level positions, he decided to go back to school. He started at Flint Hills Technical College (Flint Hills) on January 3, 2006, studying graphic arts. He completed the first semester and was then recommended for a job by his instructor. He started working for Professional Printing on July 8, 2006, earning $8 per hour and working an average of 38 hours a week. He testified he would be eligible for fringe benefits after 90 days of employment. Approximately six months a year, claimant also mows lawns, making $75 per week.

Dennis Linebarger is the slaughter human resources manager at respondent. It is his responsibility to take care of employee records. In his position as the slaughter human resources manager, Mr. Linebarger conducted an investigation to make certain that the assessment of attendance points to claimant was correct. He reviewed the points with his boss, with the human resource director for the plant, with the plant's attorney, and with the workers compensation attorney for the plant. He took a statement from claimant's immediate supervisor, Ray Miller. Claimant was involuntarily terminated due to attendance.

Mr. Linebarger confirmed that the assessment of three attendance points to claimant for calling in more than two hours after his shift started was consistent with respondent's attendance policy. Mr. Linebarger's records indicate that claimant called in at 4 p.m. on April 24.

Claimant questions some of the attendance points assessed to him on dates before April 24, 2005, one of those days being June 30, 2004. Mr. Linebarger indicated that the absentee policy states that if a nurse sends an employee home because of illness, no points will be charged. However on June 30, 2004, claimant was assessed one point when he told the nurse that he was on medication for a nonwork-related illness and the nurse sent him home. Mr. Linebarger indicated that claimant received the one-point assessment because he did not work that day at all and because his illness was nonwork-related. If an employee in that same situation was on medication for a work injury, he or she would not be assessed points.

Claimant told Mr. Linebarger that he believed he had been required to violate his 40-pound weight restriction on April 23, the last day he worked. Claimant said he believed the shaft he was required to lift weighed in excess of 40 pounds. Claimant's supervisor related that he had placed claimant in a job in which he could sit on a bench. Claimant was monitored to make sure he had help if he needed it. Claimant's supervisor also indicated that the shaft claimant lifted did not weigh more than 40 pounds.

Respondent questions claimant's testimony that he did not have a phone available to him on April 24, 2005. Mr. Linebarger provided copies of forms signed by claimant on January 8, 2004, February 10, 2005, and April 20, 2005. On all those dates, he indicated his phone number was the same.

Dr. Chris Fevurly is board certified in internal medicine, preventative medicine, and occupational medicine. He first saw claimant on December 16, 2004, when claimant was complaining of low back pain. Claimant related to Dr. Fevurly that in the past two months and particularly in the past week he had severe low back pain. Claimant could not relate his back pain to a specific incident but thought it was related to his job duties. Dr. Fevurly examined claimant and found no neurological deficits. Claimant had mild tenderness in the low back. Dr. Fevurly opined that claimant had an acute aggravation of a preexisting low back pain.

Dr. Fevurly next saw claimant on February 24, 2005. Claimant advised he was working at his regular duties and indicated he was still having mild symptoms. X-rays were taken which showed he had degenerative changes in the lumbar area. Claimant was released to do his regular job and was continued on conservative treatment.

Dr. Fevurly saw claimant again on March 17, 2005. Claimant was doing pretty well at that time and rated his pain as a one on a scale of one to ten. However, claimant returned on March 29, 2005, and reported that he had gotten worse. Dr. Fevurly assigned a 20-pound weight lifting restriction and a restriction against repetitive bending and stooping. Dr. Fevurly ordered an MRI, which showed claimant had degenerative disc changes without herniation and early osteoarthritis changes at L3-4, L4-5, and L5-S1.

Dr. Fevurly saw claimant on April 7, 2005. At that time, he concluded that claimant had reached maximum medical improvement relative to his low back complaint. Dr. Fevurly recommended permanent work restrictions of occasional lifting to 40 pounds with frequent lifting to 30 pounds. Repetitive bending and stooping should be limited, and he should be able to alternate sitting and standing as needed. Dr. Fevurly reviewed a task list prepared by Dick Santner and of the 45 tasks on the list, he opined that claimant was unable to perform 16 for a task loss of 36 percent.

Using the AMA *Guides*[2], Dr. Fevurly opined that claimant had a Category II, diagnosis related estimate (DRE) lumbosacral impairment, entitling him to a 5 percent whole person impairment.

Dr. Fevurly last saw claimant on March 14, 2006, at which time he reviewed the records of Dr. Wertzberger and Dr. Amundson. Claimant complained of pain rated as a six on a scale of one to ten. On that date, claimant was receiving vocational training. Claimant's subjective complaints were no better but Dr. Fevurly's examination was relatively unremarkable. It had been 11 months since claimant had worked for respondent, and he was still having the same pain, which led Dr. Fevurly to believe that the repetitious nature of claimant's daily work was not a major contributor to his ongoing complaints. Dr. Fevurly continued to think that claimant had a 5 percent whole person impairment for an aggravation of a preexisting condition.

Dr. Glenn Amundson, a board certified orthopedic surgeon, examined claimant on October 5, 2005, at the request of claimant's attorney. He took a history from claimant and then reviewed the medical records. Dr. Amundson found that claimant had a poor memory concerning the onset of his symptoms but stated that claimant's report to Dr. Fevurly indicated a gradual onset of pain from his work activities. Upon examination, Dr. Amundson found claimant had tenderness in the mid line and some reduced range of motion. The MRI showed various stages of disc degeneration at L1-2, L2-3, L3-4, and L4-5. Dr. Amundson believed claimant was manifesting low back pain, some secondary muscle spasm, and reduced range of motion. Using the AMA *Guides*, Dr. Amundson opined that claimant had a Category II, DRE lumbosacral impairment entitling him to a 5 percent whole person impairment.

Dr. Amundson recommended claimant have permanent restrictions which included limiting occasional lifting to 35-40 pounds. He should avoid sustained or awkward postures of the lumbar spine and repetitive bending, pushing, pulling, twisting, or lifting activities. Dr. Amundson reviewed the task list prepared by Dick Santner and opined that of the 45 tasks on the list, claimant is unable to perform 18 for a task loss of 40 percent.

Dick Santner, a vocational rehabilitation counselor, met with claimant on April 17, 2006, at the request of claimant's attorney. Together, they prepared a task list showing 45 tasks claimant had performed in the 15 years before his work-related injury.

In assessing claimant's job-earning capacity, Mr. Santner considered his education, the locality where he lived, his work history, his skill levels, and his restrictions. Claimant had completed the 8th grade of school and had obtained a GED. His transferrable skills would be welding and knowledge of electricity. Mr. Santner said that Dr. Fevurly's restriction that

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[2] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

claimant be able to alternate sitting and standing is hard to accommodate. Nevertheless, Mr. Santner opined that claimant would be capable of finding a job that paid in the area of $6.50 to $8 per hour, with his most likely wage earning capacity being $7 per hour. He believed that claimant could be a cashier at a convenience store, a parking enforcement worker, a lot attendant, a production worker, a mower, a floor care specialist, or a janitor.

At the time claimant was interviewed by Mr. Santner, he was attending Flint Hills with the hope of going to work for a printing company as a press operator. He had also begun a lawn care service. He did not remember asking claimant whether he was looking for work other than as a lawn care service worker at the time of the interview. Claimant testified he looked for work even while he attended school at Flint Hills but did not keep a list of any contacts he made.

The Board agrees with the ALJ and finds that based upon the opinions given by Drs. Amundson and Fevurly, claimant sustained a 5 percent permanent impairment of function from the combined effects of his series of work-related back injuries. In addition, the Board finds claimant suffered a task loss of 38 percent. This is an average of the opinions of the two physicians who gave opinions as to claimant's task loss using the task list prepared by Mr. Santner.

Permanent partial disability under K.S.A. 44-510e(a) is defined as the average of the claimant's work task loss and wage loss. But, it must first be determined that a worker has made a good faith effort to find appropriate employment before the difference in pre- and post-injury wages based on the actual wages can be used. If it is determined that a good faith effort has not been made, then an appropriate post-injury wage will be imputed based on all the evidence, including expert testimony concerning the capacity to earn wages.[3]

The Kansas appellate courts have also interpreted K.S.A. 44-510e(a) to require workers to make a good faith effort to continue their employment post injury. The courts have held that a worker who is capable of performing accommodated work should advise the employer of his or her medical restrictions and should afford the employer a reasonable opportunity to adjust the job duties to accommodate those restrictions. Failure to do so is evidence of a lack of good faith.[4] Additionally, permanent partial general disability benefits are limited to the functional impairment rating when the worker refuses to attempt, voluntarily quits, or is terminated from a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage where the termination is for reasons that demonstrate

[3] *Copeland v. Johnson Group, Inc.*, 26 Kan. App. 2d 803, 804, 995 P.2d 369 (1999), *rev. denied* 269 Kan. 931 (2000).

[4] *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

a lack of good faith by the worker.[5] The Board finds that the circumstances surrounding termination in this case do not establish a lack of good faith by claimant.

The Kansas Court of Appeals in *Watson*[6] reiterated that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the court held that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[7]

Furthermore, unemployment or job change due to economic change, such as a layoff, can result in a work disability.[8] In *Lee*,[9] it was stated:

> It is not the intent of the legislature to deprive an employee of work disability benefits after a high-paying employer discharges him or her as part of an economic layoff where the employer was accommodating the injured employee at a higher wage than the employee could earn elsewhere.

Retaining an employee in a job that pays a comparable wage artificially avoids a work disability until the worker is exposed to the open labor market wherein a work disability may be revealed.[10]

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[5] See, *e.g.*, *Beck v. MCI Business Services, Inc.*, 32 Kan. App. 2d 201, 83 P3d 800, *rev. denied* 276 Kan. 967 (2003); *Parsons v. Seaboard Farms, Inc.*, 27 Kan. App. 2d 843, 9 P.3d 591 (2000); *Lowmaster v. Modine Mfg. Co.*, 25 Kan. App. 2d 215, 962 P.2d 1100, *rev. denied* 265 Kan. 885 (1998)*;Cooper v. Mid-America Dairymen*, 25 Kan. App. 2d 78, 957 P.2d 1120, *rev. denied* 265 Kan. 884 (1998).

[6] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[7] *Id.* at Syl. ¶ 4.

[8] *Gadberry v. R.L. Polk & Co.*, 25 Kan. App. 2d 800, 975 P.2d 807 (1998).

[9] *Lee v. Boeing*, 21 Kan. App. 2d 365, Syl. ¶ 3, 899 P.2d 516 (1995).

[10] *Roskilly v. Boeing Co.*, 34 Kan. App. 2d 196, 116 P.3d 38 (2005); *Niesz v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, 993 P.2d 1246 (1999).

In *Bohanan,*[11] the court found claimant's refusal to perform jobs that were outside her restrictions or were temporary or that would not restore her to a wage that was comparable to her preinjury wage did not constitute a lack of good faith so as to invoke the policy considerations of *Foulk*.[12] Therefore, *Bohanan* was not denied a work disability award.

The Board finds that claimant demonstrated a good faith effort to perform his accommodated job with respondent and, therefore, the wage he was earning with respondent post injury will not be imputed to claimant. Thereafter, however, claimant did not make a good faith job search until he found work with Professional Printing. The Board finds claimant has the ability to earn $357.50 per week post injury, which corresponds with $8 per hour for 40 hours or $320 per week, plus $37.50 representing the average weekly earnings from lawn mowing on an annual basis ($75 per week for six months of the year). Thus, claimant's actual post injury earnings at Professional Printing plus his average annual earnings from lawn mowing will be used to determine his wage loss. Accordingly, the Board finds:

From December 15, 2004, through April 23 or 27, 2005,[13] claimant was working and earning at least 90 percent of his preinjury average weekly wage and thus had no work disability. Thereafter, claimant suffered a wage loss of 45 percent. When the 45 percent wage loss is averaged with the 38 percent task loss, claimant's work disability is 41.5 percent. As claimant's gross average weekly wage changed on April 29, 2005, from $614.13 to $649.87 when his fringe benefits were discontinued by respondent, claimant's compensation rate for his award of permanent partial disability will likewise change from $409.44 to $433.27.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated October 18, 2006, is modified to show that claimant is entitled to a 5 percent functional disability until he was terminated by respondent. Thereafter, claimant is entitled to a 41.5 percent work disability.

Claimant is entitled to 19.14 weeks of permanent partial disability compensation at the rate of $409.44 per week or $7,836.68 for a 5 percent functional disability, followed by 153.09 weeks of permanent partial disability compensation at the rate of $433.27 per week or $66,329.30 for a 41.5 percent work disability, making a total award of $74,165.98.

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[11] *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

[12] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 877 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995)

[13] Ex. 4 of Linebarger Depo., shows claimant's last day worked was April 27, 2005, and his date of termination was April 29, 2005.

As of January 25, 2007, there would be due and owing to the claimant 19.14 weeks of permanent partial disability compensation at the rate of $409.44 per week in the sum of $7,836.68 plus 91 weeks of permanent partial disability compensation at the rate of $433.27 per week in the sum of $39,427.57 for a total due and owing of $47,264.25, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $26,901.73 shall be paid at the rate of $433.27 per week for 62.09 weeks or until further order of the Director.

The Board adopts the other orders of the ALJ to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this _____ day of January, 2007.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: Jan L. Fisher, Attorney for Claimant
Gregory D. Worth, Attorney for Self-insured Respondent
Brad E. Avery, Administrative Law Judge